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IN THE

Supreme Court of the United States

JENNIFER GRATZ AND PATRICK HAMACHER,
Petitioners,

v.

LEE BOLLINGER, JAMES J. DUDERSTADT, AND THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether this Court should reaffirm its decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and hold that the educational benefits that flow from a diverse student body to an institution of higher education, its students, and the public it serves, are sufficiently compelling to permit the school to consider race and/or ethnicity as one of many factors in making admissions decisions through a "properly devised" admissions program; and, if so, whether the admissions program of the University of Michigan's College of Literature, Science, and the Arts is properly devised.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 11

ARGUMENT 13

I. THE UNIVERSITY OF MICHIGAN MAY CONSIDER RACE AND ETHNICITY AS FACTORS IN ADMISSIONS TO OBTAIN THE EDUCATIONAL BENEFITS OF DIVERSITY. 13

A. Settled Principles Of *Stare Decisis* Require Continued Adherence To *Bakke*'s Core Holding. 14

B. Institutions Of Higher Learning Have A Compelling Interest In Obtaining The Educational Benefits Of Diversity That Justifies The Consideration Of Race And Ethnicity. 21

II. LS&A'S ADMISSIONS PROGRAM IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTEREST OF OBTAINING THE EDUCATIONAL BENEFITS OF DIVERSITY. 32

A. LS&A's Admissions Program Is Narrowly Tailored. 33

B. The University Cannot Achieve Meaningful Diversity Without Considering Race And Ethnicity As Factors in Admissions. 41

CONCLUSION 50

TABLE OF AUTHORITIES

CASES

Page(s)

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 17, 20, 21, 31

Alexander v. Sandoval, 532 U.S. 275 (2001) 20

Batson v. Kentucky, 476 U.S. 79 (1986) 26

Board of Education v. Pico, 457 U.S. 853 (1982) 24

Board of Regents of University of Wisconsin v. Southworth, 529 U.S. 217 (2000) 24

Brown v. Board of Education, 347 U.S. 483 (1954) 24

Bush v. Vera, 517 U.S. 952 (1996) 26

California Democratic Party v. Jones, 530 U.S. 567 (2000) 31

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 14, 33

Dickerson v. United States, 530 U.S. 428 (2000) 16, 17

Easley v. Cromartie, 532 U.S. 234 (2001) 20, 49

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 19

Georgia v. McCollum, 505 U.S. 42 (1992) 26

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991) 16

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TABLE OF AUTHORITIES—CONTINUED

Page(s)

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Johnson v. Transportation Agency, 480 U.S. 616 (1987) 20

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Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 21, 27, 31, 37

Miller v. Johnson, 515 U.S. 900 (1995) 20, 34, 36

Mitchell v. United States, 526 U.S. 314 (1999) 17

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 16, 17, 18, 19

Plyler v. Doe, 457 U.S. 202 (1982) 24

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Regents of the University of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 22

Shaw v. Reno, 509 U.S. 630 (1993) 20

Sweatt v. Painter, 339 U.S. 629 (1950) 24

Taylor v. Louisiana, 419 U.S. 522 (1975) 26

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 6

TABLE OF AUTHORITIES—CONTINUED

Page(s)

United States v. Fordice, 505 U.S. 717 (1992) 19

Vasquez v. Hillery, 474 U.S. 254 (1986) 16

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 14, 20, 31, 32, 49

STATUTES

42 U.S.C. § 1981 19

No Child Left Behind Act, Pub. L. No. 107-110, § 5301(a)(4) (A), 5301(a)(5), 115 Stat. 1425, 1806 (2002) 46

REGULATIONS

34 C.F.R. § 100.3(b)(6)(ii) 18

LEGISLATIVE MATERIALS

44 Fed. Reg. 58,509 (Oct. 10, 1979) 18

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STATEMENT OF THE CASE

1. The College of Literature, Science, and the Arts ("LS&A") is the flagship undergraduate institution of the University of Michigan, one of the Nation's leading public institutions of higher education. LS&A seeks to provide an education that will prepare its students to excel in their chosen vocations and to participate as active citizens in our democracy. The University of Michigan enjoys a first-rate reputation for educational excellence and attracts nearly two-thirds of its applicants and a third of its entering class from outside Michigan, including all 50 states and over 80 nations.

LS&A is a selective institution. It receives many more applications than it has available spaces.[1] *See* Pet. App. 4a.[2] A great many of these applicants are fully qualified to attend LS&A. *See id.* at 108a. Indeed, it is undisputed that LS&A admits only qualified applicants. *See id.* at 46a, 111a. Thus, in selecting students from this competitive pool, "admissions officers must decide which set of applicants, *considered individually and collectively*, will take fullest advantage of what the college has to offer, contribute most to the educational process in college, and be most successful in using what they have learned for the benefit of the larger society." CAJA 1500 (emphasis in original).

Offers of admission are building blocks from which a university constructs its educational environment. There is a common misperception, especially when viewed from a single applicant's isolated perspective, that offers of admission are entitlements based on grades and test scores. *See id.* at 1506. That fundamentally misunderstands the

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[1] In 1997, when petitioners filed this lawsuit, for example, LS&A enrolled only 3,958 first-year students from more than 13,500 applicants. *See* Pet. App. 4a. Last year, LS&A received more than 17,000 applications.

[2] "Pet. App." refers to the Petition Appendix; "JA" refers to the Joint Appendix filed in this Court; "CAJA" refers to the Joint Appendix filed in the Sixth Circuit.

nature of admissions at a selective institution: with a finite number of available spaces, many qualified applicants must be rejected despite strong credentials. Grades, test scores, and other academic indicators are important in assessing an individual's potential contribution, but they are by no means the only relevant factors.[3]

The University considers a broadly diverse student body "an integral component of its mission" because such diversity "increase[s] the intellectual vitality of [its] education, scholarship, service, and communal life." Pet. App. 4a. Thus, the task of the admissions office is to assemble a class that will collectively "create an environment on our campus" that is diverse in many respects and that will foster the most vibrant educational atmosphere. CAJA 1483. To do so, LS&A selects from among qualified applicants with wide-ranging interests, achievements, experiences, talents, and beliefs, and different cultural, racial, ethnic, socioeconomic, and geographic backgrounds.

Racial and ethnic diversity is a single, though crucial, element of the diversity the University seeks. College is a coming of age, and college students, most of whom are between eighteen and twenty-two years old, learn as much from one another as through classroom study. *See* CAJA 1651-52, 1656-59, 1669-70, 1717, 1740. Living, working, and learning with a racially diverse group of peers provides opportunities for a richer exchange of ideas—whether or not explicitly touching on race—that reflects a wider range of life experiences. Such interactions allow students to develop a broad variety of academic and interpersonal skills, including understanding and tolerance with respect to race and ethnicity and the ability to thrive in a multiracial

[3] In 1995, when petitioner Gratz applied to LS&A, more than 1,400 white and Asian-American students with *lower* adjusted high school GPAs or test scores than hers were admitted, while more than 2,000 white and Asian-American students with *higher* adjusted GPAs or test scores were rejected. *See* CAJA 590.

environment. *See id.* at 1652-53. Neither petitioners nor the United States denies the value of the educational benefits of diversity.

Yet, without the presence of meaningful numbers of minority students on campus, these interactions—and the educational benefits they foster—cannot take place. *See* CAJA 1668-69, 1732-36, 1836; Pet. App. 40a.[4] Meaningful racial and ethnic diversity in a wide variety of educational environments is necessary both to ensure that minority students do not feel isolated or pressured to "represent" their racial or ethnic group, and to break down stereotypes by allowing students to view each other as unique individuals. *See* CAJA at 1734-40, 1834-36.

2. LS&A endeavors to enroll a broadly diverse student body while simultaneously maintaining its commitment to academic excellence. To achieve these two essential aspects of its mission—in light of the very small pool of potential minority applicants with competitive academic qualifications—LS&A must consider race or ethnicity as a factor in making admissions decisions.

To achieve the educational benefits of diversity, LS&A also pursues means other than considering race in admissions. LS&A vigorously recruits minority students with competitive academic credentials, both to maximize the number of such students who apply and to increase the percentage of those admitted who choose to enroll (the "yield"). *See* Pet. App. 42a. LS&A's minority recruiting and outreach efforts are a year-round campaign that includes identifying and contacting talented minority students from across the country; attending recruiting fairs in areas with substantial minority populations; hosting workshops for high school counselors; maintaining an office in Detroit to recruit local high school students, most of whom are minorities; coordinating campus visits for minority high school students;

[4] As used herein, the term "minority" refers to African-Americans, Hispanics, and Native Americans. *See infra* n.13.

enlisting the aid of current students to encourage admitted minority students to enroll; and hosting a Spring Welcome Day and other events for admitted minority students. *See id.*; CAJA 1480-81, 1487-88.

The University has found, however, that these targeted recruiting and outreach efforts are simply not enough. *See* Pet. App. 42a; CAJA 1441. That is because the number of potential minority applicants with competitive academic qualifications is very small—both in absolute terms and relative to the number of qualified non-minority applicants. *See* Pet App. 42a; CAJA 1441, 1492. For example, of all high school students in the United States in 1999 with a grade point average of B or above and SAT scores of 1200 or above, only 6% were African-American, Hispanic, or Native American. *See* CAJA 4016. Likewise, of all students in the State of Michigan in 1999 with those grades and scores, only 5% were African-American, Hispanic, or Native American. *See id.* at 4017. In addition, intense competition with other selective institutions for these highly sought-after students compounds this pool size problem by depressing the yield. *See id.* at 1492, 3992.

This reality has practical consequences for LS&A's admissions program. It means, first, that in making admissions decisions, LS&A must consider race and ethnicity to attempt to enroll meaningful numbers of minority students and thereby provide all students with the educational benefits of diversity. *See* Pet. App. 42a-43a; CAJA 1836, 1912-16.[5] It also means that, because the

[5] A race-neutral version of the current admissions system would reduce dramatically the number of minority students admitted to LS&A. *See* Pet. App. 40a-41a; CAJA 1901-02, 1874-76. In 1996, for example, under a race-blind system, the number of minority students admitted would have dropped from 1,335 to 269—out of 10,363 total admitted students. *See* CAJA 1874, 1881. This would have a devastating effect on integration in important learning contexts at the University. Under such a system, for example, the likelihood that a 60-person residence hall would include at least three African-Americans and at least three Hispanics would plummet from 92% to 19%. *See id.* at 1917. The likelihood of being the sole African-American student in that residence hall would jump from 2% to 31% under a race-blind admissions system, and the probability of being the sole African-American in a 30-person Introductory Psychology section would more than double, from 33% to 71%. *See id.* at 1921.

number of qualified minority applicants is so limited, LS&A ends up admitting virtually all minority applicants with competitive academic credentials.[6] *See* CAJA 1472-73, 1491-92.

3. The Office of Undergraduate Admissions ("OUA") employs 20 full-time, professional admissions counselors who spend most of each year reviewing application files and making admissions decisions.[7] Each of the more than 17,000

[6] Petitioners' suggestion that the University has a "policy" of admitting all qualified minority applicants is incorrect. *See* Pet. Br. 4. There is no such policy. The fact that virtually all qualified minority applicants are admitted is simply a description of admissions outcomes given that there are few such applicants. Moreover, although prior versions of LS&A's admissions guidelines encouraged counselors to admit qualified minority candidates as quickly as possible, without postponing decisions on their applications, it is undisputed that the guidelines from 1999 forward discontinued this practice. *See* Pet. App. 113a, 118a.

[7] LS&A implemented its current admissions system through guidelines adopted to govern admissions for the class entering in the fall of 1999. That system remains in place today. The admissions programs governed by the 1995-98 guidelines included three race-conscious practices that the University undisputedly has discontinued and disavowed: (1) the use of grids that take race into account by setting forth admissions options for applicants with various combinations of qualifications; (2) the exemption of minority students from the practice of rejecting candidates with very low grades and test scores without counselor review; and (3) a procedure known as "protected seats" that used projections of expected applications from groups known to apply late in the process (including minorities) to pace the rolling admissions process to permit consideration of such applications. *See* JA 275. The district court concluded that, while the use of grids, standing alone, was not necessarily unlawful, the combination of the three practices was impermissible. *See* Pet. App. 47a-48a. Petitioners devote much of their brief to attacking these abandoned admissions practices. However, because the University did not cross-petition to seek review of the district court's determination that these practices, taken together, were impermissible, those practices are not properly before this Court. *See,*

applications OUA receives is read from front to back and evaluated by a counselor. The volume of applications requires procedures and routines to promote fairness and consistency, while preserving counselors' ability to exercise judgment. *See* JA 223.[8] A single, unitary set of guidelines, which is reviewed annually and altered periodically, governs the admissions process.[9] The aim of the guidelines is to "blend the consistency of a formula with the flexibility of a review that is ultimately a matter of human judgment." *Id.* OUA instructs counselors that "[a]dmissions is more art than science, and these guidelines should not be read otherwise." *Id.*

Each counselor is assigned a geographic territory and is responsible for reviewing *all* applications from that region, regardless of the race of the applicant. *See* Pet. App. 38a. There is no separate review of minority applicants, *see id.*, and LS&A does not employ quotas or numerical targets for admission or enrollment of minority students, *see id.* at 36a.

Counselors assess a broad range of academic and other factors that the University believes are important in composing a class. To facilitate consistency, counselors

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e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) (cross-petition is required to alter the judgment below).

[8] The volume of applications and the presentation of applicant information make it impractical for LS&A to use the same admissions system as the much smaller University of Michigan Law School. The large number of applications precludes LS&A from having a single decisionmaker. Also, applications to LS&A are not accompanied by comprehensive reports like those received by the Law School (from the Law School Data Assembly Service, a national clearinghouse), containing data on applicants' grades and test scores and comparing each applicant to others from the same undergraduate institution.

[9] Contrary to petitioners' assertion, there are no "written guidelines" for minority applicants that are "separate from . . . guidelines applicable to all other races and ethnicities." Pet. Br. 21. The document petitioners quote, *see* Pet. Br. 4, dated 1995, is *not* a guideline or policy and was never used to guide admissions decisions. It simply summarizes the typical admissions outcomes for minority applicants under LS&A's prior guidelines. *See* JA 80-81.

calculate a "selection index" by assigning numerical values for a variety of factors, up to a possible total of 150 points. *See* CAJA 1118, 1147.[10] While the selection index is designed to guide counselors' evaluations, it does not purport to identify every possible factor that might bear on an admissions decision.

Consonant with LS&A's commitment to academic excellence, the vast majority of available points are for academic factors. Of the 150 total potential points, 110 are available for academic factors, and a maximum of 40 are available for other factors. *See* JA 224.

The predominant factor is high school grade point average. Eighty points are available for GPA from tenth and eleventh grades, excluding non-academic courses. *See id.* at 225. Standardized test scores play a relatively smaller role in the admissions process, accounting for up to 12 points. *See id.* at 224, 230-31.[11]

Counselors use the expertise they develop concerning schools in their geographic region to evaluate several non-quantitative academic factors that provide a more detailed

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[10] Petitioners inaccurately describe changes LS&A made to its admissions programs since 1995. First, the changes made between the 1997 and 1998 guidelines were not related to this litigation. *See* Pet. Br. 5. The 1995-1997 guidelines were in effect when petitioners applied, but at the time the lawsuit was filed, the 1998 guidelines were already in effect. Second, the University did not stipulate that all changes to its admissions guidelines since 1995 were non-substantive. The Joint Proposed Summary of Undisputed Facts states that "[t]he development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions." Pet. App. 116a. This statement addressed only the change from the grids to the selection index and did not address any other changes to the admissions process. The district court did not contradict that statement when it determined that, in the aggregate, all of the changes to the admissions system—particularly the abandonment of protected seats and automatic rejections—were constitutionally significant.

[11] Test scores are highly correlated with grades and therefore do not add much value in predicting an applicant's future academic performance. *See* CAJA 1929.

portrait of an applicant's academic promise. Applicants may receive up to ten points for the academic strength of their high school. *See id.* at 226-28, 240.[12] In addition, "[g]iven the wide disparity in high school course selection and offerings," counselors are asked to assess the rigor of each applicant's course of study based on their knowledge of the meaning of course labels (e.g., "honors") used by the schools in their territory. *Id.* at 228. Counselors subtract up to four points for an applicant who chose a weaker curriculum when a stronger one was available, and add up to eight points for an applicant who selected more challenging courses. *See id.* at 228-30.

In addition to the 110 points available for academic qualifications, applicants also may receive a maximum of 40 points for other factors that the University believes indicate an applicant's potential contribution to the life of the campus. *See id.* at 231. Some of these factors relate to specific attributes; others are more open-ended, allowing counselors to take into account factors not specifically identified on the selection index, such as community volunteering, playing the trombone, writing poetry, or working part-time.

Reflecting the University's commitment both to Michigan residents and to broader geographic diversity, counselors assign ten points for Michigan residency, six additional points for residency in underrepresented Michigan counties (e.g., those in the State's Upper Peninsula), and two points for residency in underrepresented states (e.g., many in the West and South). *See id.* at 232-33. Applicants receive four points if a parent is an alumnus of the University or one point if another close relative, such as a sibling or grandparent, is an alumnus. *See*

[12] Counselors rate the high schools in their territory based on factors including college attendance rate, Advanced Placement courses offered, and average standardized test scores. *See* JA 226-28. Every applicant from the same secondary school receives the same number of points for this factor. *See id.*

id. at 233-34. An applicant may also receive 20 points for one—but only one—of the following: socioeconomic disadvantage, membership in an underrepresented minority group,[13] attendance at a predominantly minority or predominantly socioeconomically disadvantaged high school, recruitment for athletics, or at the Provost's discretion. *See id.* at 238-39. Based on information in the application, essay, or high school counselor's recommendation as to activities, work experience, and awards, counselors may assign up to five points for leadership and service. *See id.* at 236-38. Counselors may give up to five additional points for personal achievement as evidenced by persistence, character, commitment to high ideals, and level of awards. *See id.* at 235-36. Finally, counselors also may award up to three points for the personal essay, taking into account originality, organization, subject matter, and writing quality. *See id.* at 234. No matter how many non-academic factors might apply to a given applicant, no applicant may receive more than 40 (of the 53 available) points for any combination of such factors. *See id.* at 231.

Recognizing that the selection index score may not always reflect all of the ways an applicant might contribute to LS&A, in 1999, the University formed the Admissions Review Committee ("ARC") to evaluate more complex admissions cases. For these cases, every member of the ARC closely reviews each applicant's entire file; the whole committee discusses the applicant's strengths and weaknesses; and the committee decides whether to admit based on its assessment of the candidate (without further reference to the selection index). *See id.* at 273-75.

[13] LS&A considers African-Americans, Hispanics, and Native Americans to be underrepresented minorities for purposes of considering race or ethnicity in admissions. *See* CAJA 1471. Because LS&A receives sufficient numbers of applications from qualified white and Asian-American students, it can enroll meaningful numbers of such students without consideration of race or ethnicity in admissions. *See id.* at 1445.

Counselors have broad discretion to decide whether an application warrants this additional level of in-depth review. *See id.* at 257. A counselor may, in his or her "discretion and judgment," "flag" an application for ARC review if the counselor determines that the applicant meets three criteria: (1) is academically prepared to do the work at LS&A; (2) has a selection index score greater than 75 for non-Michigan residents and greater than 80 for Michigan residents; and (3) possesses at least one of a variety of qualities or characteristics important to the University's composition of its freshman class, such as underrepresented race, ethnicity, or geography; high class rank; socioeconomic disadvantage; unique life experiences, challenges, circumstances, interests or talents; connections to the University community; or athletics. *Id.* at 257-60. These wide-ranging criteria allow counselors the discretion to flag for ARC review a broad array of "any number of applicants, including applicants other than under-represented minorit[ies]."[14] Pet. App. 40a.

During the admissions season, decisions are made periodically, based on selection index scores, for all applications then pending. To avoid overenrollment, LS&A sets and adjusts, when necessary, the selection index levels that trigger the three possible admissions outcomes—admittance, deferral, and denial. *See* JA 275. Flagged applications that are not admitted based on the selection index are sent to the ARC for review and final decision. *See id.*

The result of this admissions process is a student body of remarkable talent and diversity.

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[14] While race therefore may be a factor in deciding which applicants receive this more searching review, petitioners are incorrect to suggest that all—or even close to all—minority applicants are flagged for this process, *see* Pet. Br. 7. *See* Pet. App. 39a-40a. Nor are all of the candidates who receive flags minorities. *See id.*

SUMMARY OF ARGUMENT

1. In the twenty-five years since this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), virtually all of this Nation's selective colleges and universities have embraced the educational value of a broadly diverse student body and have relied on *Bakke* in crafting admissions policies designed to obtain that diversity. These schools have sought and enrolled students of different cultural, racial, ethnic, socioeconomic, and geographic backgrounds, who bring with them a variety of interests, talents, beliefs, and experiences. Through this diversity, these colleges and universities have provided their students with a better education.

Race and ethnicity are significant components of this diversity. Our country is becoming increasingly diverse and increasingly aware of its diversity. We nevertheless remain a society largely separated by race and ethnicity. It is all too common for students to come to college campuses from high schools where they have had little opportunity to interact with students of different racial and ethnic backgrounds.

This is at once an educational challenge and an educational opportunity. Bringing together students with different life experiences creates opportunities for rich and vivid exchanges, as students reflect on those experiences in a new context and share their own interpretations of them. By assembling a diverse student body, universities also encourage students to identify and confront unspoken and, indeed, often unconscious stereotypes. Seeing similarities and differences across dividing lines—whether real or perceived, and whether drawn according to race, sex, geography, or belief—is a vital part of undergraduate education. To achieve sufficient racial and ethnic diversity to generate those educational benefits, the University of Michigan must consider race or ethnicity as one of many factors in admissions.

Petitioners argue that the Constitution prohibits the University from taking race into account to obtain the benefits of a racially and ethnically diverse student body.

But a majority of this Court held in *Bakke* that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320. The majority agreed that a university is not required to adopt race-blind admissions policies, and expressly cited the admissions policy of Harvard College—which was designed to attain diversity—as an example of a constitutional race-conscious admissions program. Petitioners argue about *Bakke*'s meaning, but ultimately ask this Court to overrule it. Yet they have offered no persuasive justification for this Court to do so. Hundreds of selective public and private colleges and universities have relied on *Bakke*. Undermining this reliance would have serious consequences for our national educational culture, leading, among other things, to a near-total absence of minority students in our Nation's selective colleges and universities.

2. The University's consideration of race and ethnicity is a function of the fact that the number of potential minority applicants with the competitive academic credentials it seeks is quite small. The University's extensive outreach and recruiting efforts do not, without more, lead to the enrollment of meaningful numbers of minority students. Even taking race into account to the extent that it currently does—while maintaining its commitment to academic excellence—the University is unable to achieve the full benefits of diversity across all learning environments. Thus, a ruling that either forecloses the consideration of race altogether, or requires the University to place measurably less weight on race as a factor, would preclude the University from enrolling meaningful numbers of minority students.

The University of Michigan has crafted its admissions program in reliance on and in compliance with the principles elucidated in *Bakke*. The University has no quotas or numerical targets for the admission or enrollment of minority students. Each application, regardless of the race of the applicant, is read and evaluated by a counselor,

according to a uniform set of standards. The University values diversity across a broad spectrum of qualities and experiences, and therefore race is only one "plus" factor among many.

The United States emphasizes the educational value of a diverse student body but takes no position on whether that justifies the consideration of race or ethnicity to obtain it. That issue need not be reached, the United States argues, because race-neutral alternatives are available. It offers only one: the "percentage plans" now in place in Texas, California, and Florida. While these plans may be facially race-neutral, their purpose and intended effect is to achieve some measure of racial diversity. In any event, whatever the value of those plans in those States, they simply will not work for the University of Michigan because of demographic constraints. Moreover, any percentage plan would require the University to discontinue its consideration of a much wider and more nuanced range of academic factors in making admissions decisions and to abandon its mission of enrolling a broadly diverse student body.

While the consideration of race and ethnicity in LS&A's admissions program triggers strict scrutiny, it nevertheless survives constitutional challenge because the University has a compelling interest in obtaining the educational benefits of diversity, and its program is narrowly tailored to achieve that end.

ARGUMENT

I. THE UNIVERSITY OF MICHIGAN MAY CONSIDER RACE AND ETHNICITY AS FACTORS IN ADMISSIONS TO OBTAIN THE EDUCATIONAL BENEFITS OF DIVERSITY.

In *Bakke*, this Court rejected the very proposition that petitioners advance here—that the Constitution requires colleges and universities to ignore the race and ethnicity of applicants in assembling a student body, except as intended to remedy institution-specific past discrimination, *see* Pet. Br. 13. *Bakke* should not be overruled. First, discarding *Bakke* is unjustified as a matter of *stare decisis*. Doing so

would uproot longstanding, carefully considered educational policies that were developed in reliance on its holding and that have led to unprecedented integration of our Nation's premier institutions of higher education. Second, a wealth of empirical evidence confirms, as educators have long believed, that Justice Powell was correct in *Bakke* to conclude that obtaining the educational benefits of diversity improves the educational experience for all students, and constitutes a compelling interest that justifies the consideration of race and ethnicity in a properly devised admissions program.[15]

A. Settled Principles Of *Stare Decisis* Require Continued Adherence To *Bakke*'s Core Holding.

1. This Court already has confronted and resolved the central question presented here—whether, in the absence of an institution-specific history of discrimination, a university may constitutionally consider the race or ethnicity of applicants in composing its student body. Petitioners' claim that *Bakke* has no precedential value because it announced "no coherent rule," Pet. Br. 41, is wrong.[16] A majority of the Court joined in Part V-C of Justice Powell's controlling opinion,[17] which states *Bakke*'s core holding and judgment

[15] The United States concedes that diversity is an "important and laudable goal[]" for a university. U.S. Br. (*Gratz*) 11. Yet, in an attempt to sidestep *Bakke*'s controlling effect on this case, the United States asserts that race-neutral alternatives to race-conscious admissions are available, and that LS&A's current admissions system amounts to a disguised quota. Both of these assertions are incorrect, and both were properly rejected by the court below. *See infra* at Part II.

[16] *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (noting that "the number of separate writings" in cases involving affirmative action "do not necessarily reflect an intractable fragmentation in opinion with respect to certain core principles").

[17] That opinion is the narrowest ground in support of *Bakke*'s holding. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989) (O'Connor, J.) (recognizing that Justice Powell's opinion in *Bakke* demanded a more focused rationale than the "amorphous" concern with redressing societal discrimination to find a compelling interest); *Bakke*,

that the California Supreme Court's injunction barring any consideration of race in admissions "must be reversed" because "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." 438 U.S. at 320.

The Justices who formed that majority agreed on three key points that illuminate the meaning of *Bakke*'s core holding. First, they agreed that the Fourteenth Amendment does not require universities to employ race-blind admissions programs. *See id.* Second, they agreed that the Constitution permits an institution of higher education to consider race in admissions in furtherance of an interest *other than* remedying a pattern of discrimination by that institution.[18] Third, all five Justices expressly approved the admissions policy of Harvard College—which was explicitly designed to secure the educational benefits of diversity, and not to remedy societal discrimination[19]—as an example of a constitutional race-conscious admissions program. *See id.* at 316-18, 326 n.1.

Bakke is a landmark decision precisely because it decided a controversial national issue by permitting colleges and universities to take race into account in admissions,

438 U.S. at 307; *id.* at 296 n.36 (Powell, J., concurring) (describing Justice Brennan's rationale as having "breadth [that is] unprecedented"). It therefore controls. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Justice Powell's and Justice Brennan's opinions are not "too different" to compare, Pet. Br. 32: both approved the "competitive consideration" of race and the diversity-focused Harvard plan.

[18] A narrow remedial rationale was not even at issue in *Bakke* because it was "conceded that [the University] had no history of discrimination." 438 US. at 296 n.36.

[19] *See Bakke*, 438 U.S. at 322-23 (appending Harvard College admissions policy, which observed that "if Harvard College is to continue to offer a first-rate education to its students, minority representation in the undergraduate body cannot be ignored" because racial and ethnic diversity "adds a critical ingredient to the effectiveness of the educational experience") (citation omitted).

subject to certain limitations. Indeed, when *Bakke* was announced, scholars and commentators reached a remarkably uniform consensus as to its meaning, even among those who may have disagreed with Justice Powell's controlling opinion.[20] These contemporaneous observers correctly understood that *Bakke* resolved the question whether the consideration of race as a factor in admissions is constitutional.

2. *Stare decisis* is "indispensable" to "the very concept of the rule of law underlying our own Constitution." *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (plurality op.) (citing Powell, *Stare Decisis and Judicial Restraint*, 1991 Journal of Supreme Court History 13, 16). The doctrine "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations omitted); *see also id.* at 461 (Scalia, J., dissenting). Petitioners cannot overcome their "heavy burden" of providing that "compelling justification" for overruling *Bakke*. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986); *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

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[20] *See, e.g.*, Scalia, Commentary, *The Disease as Cure: "In order to get beyond racism, we must first take account of race,"* 1979 Wash. U.L.Q. 147, 148 (describing Justice Powell's opinion as "the law of the land"); Charles R. Babcock & Loretta Tofani, *Reaction: All Sides Optimistic; A Ruling With Something for Every Group*, Wash. Post, June 29, 1978, at A1 (quoting Robert Bork, then-professor at Yale Law School, who thus characterized *Bakke*: "We're told that we can count race somewhat, but not too much."); *The Supreme Court: 1977 Term*, 92 Harv. L. Rev. 131, 136 n.40 (1978) ("[The *Bakke* opinions] put a majority of the Court on record that a program which considers race and even the numerical balance of the class, but which does not set aside a specified number of seats for minorities, is lawful under Title VI and the 14th [A]mendment"); *The Bakke Decision*, Wash. Post, June 29, 1978, at A26 ("Those schools that want a diverse student body . . . . can give added points in the selection process to applicants because of their race just as they give added points to applicants because they are athletes, musicians, children of alumni, artists, poor, rich or residents of places from which few applications come.").

As this Court has observed, adherence to precedent is particularly important when a decision has become so woven into the fabric of our "national culture," *Dickerson*, 530 U.S. at 443, that overturning it would cause "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it," *Casey*, 505 U.S. at 855; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233 (1995) (O'Connor, J.); *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (stating that a rule's "wide acceptance in the legal culture" is an "adequate reason not to overrule" it). These reliance interests develop when a decision provides a guidepost on a contested issue around which people and institutions "organize" their affairs, "order their thinking," and "define their views of themselves and their places in society." *Casey*, 505 U.S. at 856, 860.

All of this is true of *Bakke*. Over the past quarter century, nearly every selective university in the United States has relied on *Bakke* in developing admissions and related policies designed to obtain and provide the educational benefits of a diverse student body. *See* William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, Chron. Higher Educ., Feb. 7, 2003, at B7 ("*Back to Basics*") ("Essentially all of these 'academically selective' colleges and universities have elected to take race into account in making admissions decisions.").[21] Justice Powell anticipated *Bakke*'s far-reaching influence in his announcement of the judgment on June 26, 1978:

> [M]any of our finest universities and colleges pursue a flexible competitive admissions program

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[21] It is undisputed that the University "views diversity as essential to its educational mission," and that it considers race in admissions "[t]o facilitate diversity." Pet. App. 108a-109a. After five years of litigation, petitioners for the first time question the truthfulness of the University's asserted motivation for considering race and ethnicity. Based solely on a few law review articles, petitioners also accuse the entire higher education community and, implicitly, Justice Powell, of concocting diversity as a "cover" for other motivations. Pet. Br. 46-47.

> in which race may be considered as a relevant admissions factor. This experience demonstrates that the Davis type program—one that arbitrarily forecloses all competition solely on the basis of race or ethnic origin—is not necessary to obtain reasonable educational diversity. . . . Yet the way is open to Davis to adopt the type of admissions program proved to be successful in so many of the universities and colleges of our country.

http://oyez.org/cases/cases.cgi?command=show&case_id=324 (bench statement of Powell, J.).[22]

Not only universities themselves, but the U.S. Department of Education (the agency charged with enforcing Title VI) also has relied on *Bakke* as a guide.[23] Since 1979, the Department of Education has consistently implemented *Bakke* through binding regulations and policy guidance statements confirming the legality of admissions and financial aid policies that consider race "to attain a diverse student body" in a manner consistent with Justice Powell's opinion. 44 Fed. Reg. 58,509 (Oct. 10, 1979).[24]

Overruling *Bakke* not only would upset the settled expectations of universities, but also would cause "significant damage" to our increasingly diverse Nation. *Casey*, 505 U.S. at 924. *Bakke* has been the touchstone for the substantial integration of our Nation's finest public and

[22] Because the composition of the student body is central to the development of the character, reputation, and educational environment of institutions of higher learning, those institutions' reliance on *Bakke* extends to their ability to "define their views of themselves and their places in society." *Casey*, 505 U.S. at 856. Universities also have relied on *Bakke* in devoting resources to structure their curricula, teaching programs, and learning environments to create the opportunities for interaction that trigger the educational benefits of diversity. *See, e.g.*, CAJA 1750-52.

[23] *See* CAJA 786-87 (Brief of the United States as *Amicus Curiae*).

[24] *See also* 34 C.F.R. § 100.3(b)(6)(ii); 59 Fed. Reg. 8756 (Feb. 23, 1994); 56 Fed. Reg. 64,548 (Dec. 10, 1991). These regulations remain in full force and effect.

private[25] institutions of higher learning. That integration produces real educational results both on campus,[26] and in society generally, given the role of the university as a professional and civic training ground.[27] Repudiating *Bakke* would effectively destroy these achievements.

This broad and deep reliance on *Bakke* demonstrates that its rule has in no sense "def[ied] practical workability." *Casey*, 505 U.S. at 854. To the contrary, *Bakke* provides educators with a practical framework for crafting an appropriate race-conscious admissions program. That framework incorporates a measure of flexibility that permits institutions with varying missions and different applicant pools to design admissions programs that satisfy constitutional requirements.

[25] The decision in this case will affect private institutions because the scope of Title VI, which governs institutions that accept federal funds, is coextensive with the Equal Protection Clause. *See United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992). Petitioner offers no basis for applying any different standards under 42 U.S.C. § 1981, and failed to preserve that argument in any event. *See also Gen. Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 389-90 (1982) (declining to impose broader obligations under § 1981).

[26] *See, e.g., Back to Basics* at B7 (noting that a survey of 90,000 alumni of selective colleges and universities found "much more interaction across racial lines than many people suppose").

[27] *See generally* William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998) ("*Shape of the River*"). Bowen & Bok's comprehensive research demonstrates that "academically selective colleges and universities have been highly successful in using race-sensitive admissions policies to advance educational goals important to them and societal goals important to everyone." *Id.* at 290. For example, African-American students who have enrolled at selective institutions with race-sensitive admissions policies have *higher* graduation rates than their peers with similar SAT scores who enrolled at *less* selective institutions. *See id.* at 61, 259. African-American graduates of selective institutions also have enjoyed great success in terms of increased earnings and more active involvement in community and civic undertakings. *See id.* at 257. *See also* Brief for Lt. Gen. Julius W. Becton, Jr., et al., as *Amici Curiae*.

This Court has never questioned the essential holding of *Bakke* and has, indeed, recognized its continuing vitality,[28] while evaluating race-conscious measures in contexts other than higher education.[29] In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), for example, Justice O'Connor recognized that "a fair measure of consensus" existed among the five Justices in *Bakke* who voted to reverse the California Supreme Court's injunction—including a consensus that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286

[28] *See Alexander v. Sandoval*, 532 U.S. 275, 281 (2001) (recognizing *Bakke*'s reversal of injunction against "according any consideration to race in [the] admissions process"); *Johnson v. Transp. Agency*, 480 U.S. 616, 638 (1987) (relying on *Bakke*'s "competitive consideration" rationale in approving gender-conscious promotion plan, and recognizing that plan's similarity to the Harvard plan "approvingly noted by Justice Powell" in *Bakke*); *cf. Adarand*, 515 U.S. at 258 (Stevens, J., dissenting) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial or ethnic classification] is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case[.]").

[29] This Court's case law on redistricting further supports the core holding of *Bakke*. This Court has held that in certain settings, race may be considered as part of a comprehensive evaluation, so long as it does not overwhelm other, traditional factors on which the relevant determination is made. *See Shaw v. Reno*, 509 U.S. 630, 633, 641-42 (1993) (in a decision bearing on "the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups," holding that the "Court never has held that race-conscious state decisionmaking is impermissible in *all* circumstances" but that race may not be primary factor driving voter districting); *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (race may contribute to determination so long as it is not "dominant and controlling rationale" to which neutral principles are "subordinated"); *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (race may be *a* motivation but may not be *predominant* factor driving decisionmaking). Similarly, the approach of the Harvard plan endorsed by *Bakke* recognizes that, in the unique context of higher education, race may be considered as one factor so long as it does not eclipse the consideration of other relevant factors.

(O'Connor, J., concurring in part).[30] Four years later, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 568 (1990), this Court cited *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated."[31]

B. Institutions Of Higher Learning Have A Compelling Interest In Obtaining The Educational Benefits Of Diversity That Justifies The Consideration Of Race And Ethnicity.

Setting aside *stare decisis* considerations, Justice Powell's controlling opinion in *Bakke* was correct to hold that obtaining the educational benefits that flow from a

[30] While petitioners overstate the extent to which lower courts disagree on *Bakke*'s meaning, any such disagreement cannot justify repudiating this Court's precedent. *See Hubbard v. United States*, 514 U.S. 695, 718-19 (1995) (Rehnquist, C.J., dissenting, joined by O'Connor and Souter, JJ.) (criticizing plurality for relying on "aberrant" circuit court decisions in departing from *stare decisis* and observing that this "novel corollary" threatens to "subvert[] the very principle on which a hierarchical court system is built").

[31] Although this Court held in *Adarand* that strict scrutiny applies to all racial classifications, *see* 515 U.S. at 227, the Court at the same time acknowledged that Justice Powell had in fact applied strict scrutiny in *Bakke*, *see id.* at 218-19. Accordingly, *Adarand* does not undermine *Metro Broadcasting*'s characterization of *Bakke*'s holding. *See also Metro Broad.*, 497 U.S. at 621 (O'Connor, J., dissenting) (recognizing that, in *Bakke*, Justice Powell concluded that "race-conscious measures might be employed to further diversity" "if race were one of many aspects of background sought and considered relevant to achieving a diverse student body"). Similarly, Justice Powell's application of strict scrutiny in *Bakke* forecloses petitioners' argument that *Bakke* is not entitled to *stare decisis* deference because it is somehow incompatible with current equal protection doctrine. In any case, the propositions that petitioners attribute to Justice Powell and attack as outdated, *see* Pet. Br. 37-39, are unrelated to *Bakke*'s core holding that the consideration of race in admissions to obtain the educational benefits of diversity is constitutional.

diverse student body is a compelling interest. *See* 438 U.S. at 306.[32]

In concluding that "the interest of diversity is compelling in the context of a university's admissions program," *id.* at 314, Justice Powell noted that "our tradition and experience lend support to the view that the contribution of diversity [to education] is substantial," *id.* at 313. He emphasized that a far-reaching consensus recognized the direct link between positive educational outcomes and a broadly diverse student body: "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Id.* at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).[33] This consensus is deeply rooted in our Nation's history and case law, confirmed by abundant empirical evidence, and consistent with the requirements that define a compelling interest.

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[32] Petitioners attack a straw man by characterizing the asserted interest as one in "academic freedom," standing alone. *See* Pet. Br. 13, 36. The University has never claimed that an interest in "academic freedom" is a sufficient justification for the consideration of race in admissions. Academic freedom certainly does not immunize a university's conduct from constitutional scrutiny. At the same time, this Court has recognized the "countervailing constitutional interest," rooted in the First Amendment, that universities invoke in selecting students to fulfill their educational mission, *Bakke*, 438 U.S. at 313; the autonomy and deference afforded educators in making educational judgments, *see id.*; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); and the importance of "[an] atmosphere of 'speculation, experiment and creation'" in the higher education context, *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). These principles undergird the compelling nature of the interest in achieving the benefits of diversity in the context of higher education.

[33] Justice Powell also grounded his conclusion in social science evidence. *See Bakke*, 438 U.S. at 315 n.50 & 318 n.51 (citing Manning, *The Pursuit of Fairness in Admissions to Higher Education*, in Carnegie Council on Policy Studies in Higher Education, *Selective Admissions in Higher Education* (1977)).

1. Our Nation has struggled throughout its history with the challenge of harnessing our diversity as a source of strength rather than a cause of friction. When our first President, George Washington, became concerned that the cultural, ethnic, religious, and regional differences among the colonists were creating tensions that endangered the new Nation, he drew upon his experience as leader of the Revolutionary Army. That Army was comprised of young men from across the colonies who, in Washington's words, had "imbibed" "prejudices" against one another. Exposing this diverse group of soldiers to each other, Washington found, served to "eradicate" many of these "prejudices" and create a shared sense of purpose. Seeking to harness this educational process, Washington advocated the creation of a National University to meet the urgent need for education through exposure to America's diversity:

> [T]hat which would render [a National University] of the highest importance, in my opinion, is, that the Juvenal period of life, when friendships are formed, & habits established that will stick by one; the Youth, or young men from different parts of the United States would be assembled together, & would by degrees discover that there was not that cause for those jealousies & prejudices which one part of the union had imbibed against another part .... prejudices are beginning to revive again, and never will be eradicated so effectually by any other means as the intimate intercourse of characters in early life, who, in all probability, will be at the head of the councils of this country in a more advanced stage of it.

Letter to Alexander Hamilton, September 1, 1796, *Washington Writings* (Library of America 1997); *see also* Joseph Ellis, *Founding Brothers* 154 (Knopf 2001).[34]

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[34] James B. Angell, the third president of the University of Michigan, emphasized a similar theme in his 1879 commencement address, not long

Echoing Washington's point nearly two centuries later, Justice Powell observed in *Bakke* that "it is not too much to say that the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples." 438 U.S. at 313 (internal quotation marks and citation omitted).

Well before *Bakke*, this Court recognized the importance of diversity in educational settings, noting in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), that legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts." *See also Brown v. Board of Educ.*, 347 U.S. 483, 493-95 & n.11 (1954). *Bakke* thus was a capstone to—not a departure from—an established line of precedent acknowledging the importance of diversity in education.[35]

2. This Court's recognition that diversity generates important educational benefits is reinforced by a remarkably uniform and non-ideological consensus among the country's leaders, educators, and social scientists. The President of the United States and the President of the University of Michigan share a conviction that college students "live and learn" better "with people from many backgrounds," and both "strongly support . . . racial diversity in higher education."[36] The record below contains unrebutted "solid

after the Civil War. *See* Nancy Cantor, *A Michigan Legacy: Ensuring Diversity and Democracy on Campus*, Mich. Alumnus (Summer 1998).

[35] This Court has long recognized the "special role" and significant mission of educational institutions in our democracy, *Board of Educ. v. Pico*, 457 U.S. 853, 921 (1982) (O'Connor, J., dissenting). *See, e.g., Board of Regents of Univ. of Wisc. v. Southworth*, 529 U.S. 217, 233 (2000); *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown*, 347 U.S. at 493. In enacting measures to reduce "racial isolation" in elementary and secondary schools, Congress has also repeatedly recognized the educational value of racially diverse educational settings. *See* Brief for Respondents, *Grutter v. Bollinger*, et al., No-02-241 at 21-22.

[36] Statement of President George W. Bush, Jan. 15, 2003, *available at* http://www.whitehouse.gov/news/releases/2003/01/print/ 20030115-7.html. *See also* Statement of Mary Sue Coleman, President of the University of

evidence" explaining how and why a student body that includes meaningful racial and ethnic diversity generates educational benefits for all students. Pet. App. 22a. Even petitioners do not disagree. *See* CAJA 4157.

Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race. Continuing patterns of residential segregation, for example, mean that "the daily events and experiences that make up most Americans' lives take place in strikingly homogenous settings." *Id.* at 1968.[37] As a result, most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity. This separation contributes to misconceptions and mistrust, and provides little opportunity to disrupt racial stereotypes or to experience the richness of different racial and ethnic communities. *See id.* at 1953, 1955-56. Petitioners' position—that race has no place as a consideration in college admissions outside of remedying discrete instances of past discrimination—would require universities to ignore the world in which they are educating their students to live and lead.

Rather than relying on racial stereotypes or race as a "proxy," the benefits of diversity depend on the hardly debatable proposition that being part of a racial majority or minority, in a society in which race still so profoundly matters, will inform one's perspective and base of knowledge. *Cf. J.E.B. v. Alabama*, 511 U.S. 127, 148-51 (1994) (O'Connor, J., concurring) ("We know that like race, gender matters . . . one need not be a sexist to share the intuition that in certain cases a person's gender and

Michigan, Jan. 15, 2003, *available at* http://www.umich.edu/%7Enewsinfo/Releases/2003/Jan03/r011503c.html.

[37] *See also* Erica Frankenburg, Chungmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (2003), *available at* http://www.civilrightsproject.harvard.edu.

resulting life experience will be relevant to his or her view of the case.").

In jury selection cases, for example, members of this Court have recognized that jurors of different racial backgrounds may well bring varying experiences and prejudices to bear, such that the "distorting influence of race is minimized on a racially mixed jury." *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting); *see also id.* at 60 (Thomas, J., dissenting) ("the racial composition of a jury may affect the outcome of a criminal case. . . . I do not think that this basic premise of *Strauder* has become obsolete."). Exclusion of an identifiable group of persons removes from consideration

> qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance[.]

Taylor v. Louisiana, 419 U.S. 522, 531-32 & n.12 (1975) (internal quotation marks omitted). While the unique interpretations of experience that different individuals bring may not "make an iota of difference" on any given issue, their exclusion deprives the proceedings of something valuable. *Id.* at 532.[38]

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[38] While several Justices of this Court have recognized that including persons of different races and sexes on juries may bring valuable diversity of perspective and experience, the Court has rejected the notion that jurors can be excluded on the basis of race or sex alone. *See Batson v. Kentucky*, 476 U.S. 79 (1986); *J.E.B. v. Alabama*, 511 U.S. 127 (1994). This rejection stems from the special function of the jury, where the guiding principle is impartiality. "Without denying the possibility that race, especially as an imperfect proxy for experience, makes a difference in jury decisionmaking (and, in some cases, legitimately so)," race-neutrality is the better course in the deliberately neutral context of a jury. *Bush v. Vera*, 517 U.S. 952, 1051 n.5 (1996) (Souter, J., dissenting). The "cost of the alternative is simply too great." *Id.* Those concerns have no

Petitioners seem to believe that any acknowledgment that race has some bearing on an individual's experience is to deny that person's individuality. That is not so. There is a sound distinction between acknowledging that race may affect an individual's experience, and assuming that it determines an individual's behavior or beliefs. The particular conclusions that individuals draw, or the interpretations they give to their own experiences will, of course, be as varied as the individuals themselves.[39]

Thus, the argument for diversity in no way turns on the assumption that individuals of any given race will necessarily hold any particular set of views. The educational benefits of diversity stem in large part from a very different phenomenon. Exposing students at a critical period of personal development to situations in which they *cannot* predict viewpoint or behavior based on race actually undermines and deters stereotypical thinking. *See* CAJA 1656-59, 1736-40. This type of learning can occur only in an environment with meaningful racial and ethnic diversity and corresponding opportunities for students of different races and ethnicities to interact in and out of the classroom. *See*

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place in the educational context where the institutional interest is not impartiality, but an "atmosphere of speculation," *Bakke*, 438 U.S. at 312, best achieved by the inclusion of the widest variety of perspectives.

[39] Justice Powell recognized that distinction in *Bakke*. In concluding that Davis had failed to provide empirical support for its asserted compelling interest in providing doctors to underserved areas, Justice Powell rejected the unproven assumption that minority graduates would be more likely to practice in underserved communities. *See Bakke*, 438 U.S. at 310-11. In contrast, because he concluded that a university's interest in obtaining the educational benefits of diversity was compelling, Justice Powell evidently determined that *that* interest did *not* depend on an improper, stereotyping assumption. Dissenting in *Metro Broadcasting*, Justice O'Connor made the same point, noting that the link the majority drew between "race and behavior, especially when mediated by market forces" is precisely "the assumption that Justice Powell rejected" in *Bakke*. *Metro Broad.*, 497 U.S. at 619.

id. at 1732-34.[40] Put bluntly, "[t]eaching that 'not all blacks think alike' will be much easier when there are enough blacks around to show their diversity of thought." Glenn C. Loury, *The Anatomy of Racial Inequality* 147 (2002).[41] And such diversity of thought is much more likely to emerge in settings where there are more than token numbers of minority students, so that individual minority students do not feel isolated or pressured to act as "representatives" of a racial group. *See* CAJA at 1734-36, 1835-36; *see also Bakke*, 438 U.S. at 323 (recognizing risk that lack of meaningful numbers of minority students leads to "sense of isolation"). The give-and-take from perspectives informed by the widest variety of human experience makes the most of the diversity of our Nation. This is the heart of the "robust exchange of ideas," *Bakke*, 438 U.S. at 312, that the University seeks to foster.

Diversity leads not only to greater understanding of the ways in which race may—or may not—be relevant to a whole range of issues, but it also generates broader educational benefits. Abundant empirical evidence confirms

[40] Justice Powell recognized that actual interaction with diverse peers is the vehicle by which diversity benefits students. In acknowledging the widely-held consensus that a vibrant education is linked to a diverse student body, Justice Powell quoted the statement of then-President of Princeton University, William Bowen, that "a great deal of learning occurs informally . . . through interactions among students of . . . different races." *Bakke*, 438 U.S. at 313 n.48 (citing William G. Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)). *See* Patricia Gurin, *Evidence for the Educational Benefits of Diversity in Higher Education: Response to the Wood & Sherman Critique by the National Association of Scholars* (May 30, 2001), *available at* http://www.umich.edu/~urel/ admissions/research/.

[41] This is also true for Hispanics, a population encompassing significant differences in both background and experience. "A diversity of views exists among Latinos, and the differences between the foreign born, regardless of their country of origin, and the native born and those between the English dominant and the Spanish dominant are most notable." *See* Pew Hispanic Center/Kaiser Family Foundation, *2002 National Survey of Latinos*, Executive Summary 6 (2002), *available at* http://www.pewhispanic.org/site/docs/pdf/.

educators' long-held beliefs and experience that "[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest . . . growth in intellectual engagement and motivation[.]" CAJA 1652.[42] Likewise, experience with diverse peers in an educational setting better equips students "to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good." *Id.* at 1652-53. A successful education, particularly at the undergraduate level, encourages students to move beyond familiar habits of thinking by confronting the "unknown." This is a crucial aspect of learning how to approach and understand the unfamiliar—whether it be a classmate, a foreign culture, or a newly-encountered text.[43]

Petitioners and some of their amici claim that any consideration of race in admissions causes stigmatic harm to minority students which outweighs any benefits that increased levels of diversity might bring. *See, e.g.*, Brief for National Association of Scholars as *Amicus Curiae* 23. William Bowen and Derek Bok definitively refute that

[42] *See generally Diversity Challenged: Evidence on the Impact of Affirmative Action* (Gary Orfield & Michal Kurlaender eds. 2001) ("*Diversity Challenged*"); Sylvia Hurtado, et al., *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education* (1999); *see also* Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Impacts the Classroom Environment and Student Development*, in *Diversity Challenged* at 187, 198.

[43] *See* Roxanne Harvey Gudeman, *Faculty Experience with Diversity: A Case Study of Macalester College*, in *Diversity Challenged* at 251, 271; Anthony Lising Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students* (2003), *available at* http://www.siher.stanford.edu; Patricia Marin, *The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms*, in American Council on Education & American Association of University Professors, *Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms* 61, 69 (2000).

assertion in their comprehensive study of the effects of race-conscious admissions policies at selective colleges and universities. *See Shape of the River* at xxxi.[44] Their findings demonstrate that this "assertion withers in the light of the evidence," *id.*, because "if minority students were truly demoralized, one would expect that they would be less likely than whites to succeed in graduate and professional schools, less likely to appreciate their college experience, and less inclined to report that they benefited intellectually by having attended a selective school," but "[n]one of these results appears in [the] data," *id.* at 261. Bowen and Bok found that the overwhelming majority of African-American graduates of selective colleges and universities with race-sensitive admissions programs performed well and were very satisfied with their undergraduate educational experience. *See id.* at 265.[45]

Bakke's holding has an even stronger empirical foundation today than it did in 1978. As the court below correctly concluded, *see* Pet. App. 22a, 27a-28a, extensive social science research confirms the soundness of Justice Powell's conclusion that "the attainment of a diverse student body. . . . clearly is a constitutionally permissible goal for an institution of higher education." *Bakke*, 438 U.S. at 311-12.

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[44] Amicus NAS' brief misconstrues Bowen & Bok's findings, *see* Brief for National Association of Scholars as *Amicus Curiae* 25 n.25, by omitting their conclusion that any "costs" of race-sensitive admissions are *outweighed* by the benefits: "In the eyes of those best positioned to know, any putative costs of race-based policies have been overwhelmed by the benefits gained through enhanced access to excellent educational opportunities." *Shape of the River* at 265.

[45] In *Bakke*, Justice Powell considered the possibility that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection," but concluded that this risk was outweighed by the significant educational benefits of diversity to all students. 438 U.S. at 298-99. Bowen & Bok's findings confirm that Justice Powell was right to discount the possibility of stigmatic harm resulting from considering race in admissions.

3. The interest in obtaining the educational benefits of diversity is not only firmly grounded as an empirical matter, but it also fits squarely within the framework defining whether an interest is compelling as a matter of law. While strict scrutiny clearly requires a "skeptical view of all governmental racial classifications," *Adarand*, 515 U.S. at 228, it rejects petitioners' argument that no interest other than remedying institution-specific past discrimination is capable of justifying race-conscious measures. *See* Pet. Br. 40. Strict scrutiny analysis requires "carefully examining the interest asserted by the government" precisely because it "*does* take relevant differences into account" in assessing whether an interest is sufficiently compelling. *Adarand*, 515 U.S. at 228 (emphasis in original) (internal quotation marks omitted); *cf. Calif. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (cautioning that the compelling interest "determination is not to be made in the abstract"). Contrary to petitioners' characterizations, the interest in obtaining the educational benefits of diversity is neither inappropriately amorphous nor timeless. *Cf. Metro Broad.*, 497 U.S. at 613 (O'Connor, J., dissenting).

The University's interest in providing its students with the concrete educational benefits generated by a diverse student body bears no resemblance to the generalized interest in remedying societal discrimination that has been rejected as "amorphous." *Bakke*, 438 U.S. at 307; *Wygant*, 476 U.S. at 276. Petitioners suggest that this Court's specific rejection of the role model theory in *Wygant* is actually a broad rejection of any interest that might produce educational benefits. *See* Pet. Br. 35. This argument misconstrues the nature of the interest repudiated in *Wygant*. The plurality opinion, authored by Justice Powell, characterized the role model theory—as the school district did—as a subset of the broad remedial rationale. The Court did not treat the role model theory as an interest in the educational benefits of diversity. Rather, it described the interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination[.]" *Wygant*, 476 U.S. at 274; *see also id.* at

289 n.* (O'Connor, J., concurring) (distinguishing the asserted interest from "the very different goal of promoting racial diversity among the faculty" for educational reasons).

Nor does the interest in obtaining the educational benefits of diversity justify the consideration of race in admissions without any "logical stopping point." *Id.* at 275 (Powell, J.). The need to consider race and ethnicity in admissions is inherently time-limited because it stems from the disparities in academic qualifications, such as grades and test scores, between minorities and non-minorities, and the correspondingly small number of minority students with competitive academic credentials. These phenomena are by no means permanent fixtures of our educational landscape. For example, recent studies show that test score gaps have narrowed, *see, e.g.*, *Shape of the River* at 22 (noting that SAT gap between whites and African-Americans shrank from 282 to 181 points from 1976 to 1989); *Back to Basics* at B9 (observing additional improvement through 1995), and the University looks forward to the day when it is no longer necessary to consider race in admissions to compose a diverse student body.

II. LS&A'S ADMISSIONS PROGRAM IS NARROWLY TAILORED TO ACHIEVE THE COMPELLING INTEREST OF OBTAINING THE EDUCATIONAL BENEFITS OF DIVERSITY.

LS&A's current admissions program is "properly devised" to achieve the meaningful racial and ethnic diversity that allows the University to realize the educational benefits of diversity. It hews closely to the "plus" system that *Bakke* approved, in which race and ethnicity are accorded competitive consideration in combination with other factors relevant to an applicant's potential contribution to the student body. Because LS&A is unable to achieve, through active recruiting and outreach programs, sufficient racial and ethnic diversity to make possible the opportunities for interactions that facilitate the educational benefits of diversity, *see* CAJA 1836, 1912-16, and because no race-neutral admissions alternatives

currently are viable, LS&A properly considers race and ethnicity as factors in admissions.

A. LS&A's Admissions Program Is Narrowly Tailored.

In devising and refining its admissions program, LS&A has relied on the principles set forth in *Bakke*. As Justice Powell observed, a system that considers race as one of many factors and treats each applicant as an individual reflects an appropriate fit between the objective of obtaining the educational benefits of diversity and the means by which that objective is achieved.

1. The Davis program rejected in *Bakke* "consisted of a separate admissions system operating in coordination with the regular admissions process." 438 U.S. at 272-73. The two defining features of that system were (1) a rigid quota that set aside 16 out of the 100 seats in each year's entering class for minorities, and (2) a "special admissions program" that funneled applications from minorities through a separate committee walled off from the "regular admissions process." *Id.* at 272-75. Justice Powell identified the crux of the problem with this system as the insulation of minority students from competition with all other applicants, *see id.* at 315, and the exclusion of non-minority students from competition for all places in the class, *see id.* at 318. *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (O'Connor, J.) (describing the flaw in the Davis program as the "complete[] eliminat[ion] [of] nonminorities from consideration for a specified percentage of opportunities").

By contrast, an admissions program that considers race as a "plus factor," like the Harvard policy approved by a majority of the Court in *Bakke*, comports with the Fourteenth Amendment:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all

> consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.

438 U.S. at 318. Such a system does not rely on quotas or their "functional equivalent." *Id.*

Thus, while petitioners seem to believe that comparing different manners of considering race in admissions is just an "exercise in formalism," Pet. Br. 24, *Bakke* makes clear that the process makes a constitutional difference. After all, an admissions system that operates like the approved Harvard plan might end up admitting the same number of minority students as the impermissible Davis quota system. The pertinent distinction between the two, however, is that the design of the Davis system subordinated a broad interest in educational diversity to a narrow interest in achieving a specific racial result that was not linked to an educational outcome. *See Bakke*, 438 U.S. at 315 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."); *cf. Miller v. Johnson*, 515 U.S. at 913.

Although Justice Powell rejected numerical quotas and set-asides that serve as their functional equivalents, *Bakke* makes plain that an admissions program "properly devised" to achieve the compelling interest of obtaining the educational benefits of diversity may—even must—pay "some attention to [the] numbers" of minority students admitted. 438 U.S. at 323 (quoting from the Harvard policy). Thus, *Bakke* contemplates that a university would structure its admissions system to seek to enroll "more than a token number" of minority students because "there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those

students admitted." *Id.* at 316, 323. In determining how much of a "plus" to give for race and ethnicity, universities need not weigh all factors equally. *See id.* at 317. Rather, they are permitted to set and adjust the "weights" to account for "the 'mix' both of the student body and the applicants for the incoming class" in view of the objective of enrolling meaningful numbers of minority students. *Id.* at 318.

2. The district court correctly concluded that "LSA's current admissions program, under which certain minority applicants receive a 'plus' on account of their race but are not insulated from all competition with other applicants, meets the requirements set forth by Justice Powell in *Bakke* and is therefore constitutional." Pet. App. 43a. Race is only one of "many factors" that permit applicants to receive a "plus" in LS&A's admissions process. *Id.* at 37a. LS&A "does not utilize rigid quotas or seek to admit a predetermined number of minority students," *id.* at 34a-35a, and "[t]here is no separate review or assignment of under-represented minority applicants as there was in *Bakke*," *id.* at 38a. The court thus properly concluded that LS&A's current program has *none* of the features that rendered the Davis program unconstitutional.

Indeed, the LS&A admissions system is characterized by the very features that Justice Powell described as important to a "properly devised" admissions program. Every LS&A applicant receives individualized counselor review, which Justice Powell considered a hallmark of a constitutionally appropriate admissions program. *See Bakke*, 438 U.S. at 318. Admissions counselors read every application and consider a wide range of factors that provide insight into the contribution an applicant might make to the overall educational environment. Based on these factors, counselors determine a selection index score for each applicant. Counselors may also "flag" an application for review by the Admissions Review Committee, which provides an additional level of in-depth review in a small-group discussion format and makes a decision based on the

applicant's whole file, without further reference to the selection index score.

Race or ethnicity represent only a single factor considered by counselors.[46] Whether the points awarded for race make a difference to the outcome of an admissions decision depends on the individual applicant's *combination* of qualities and credentials.[47] Applicants with very strong academic records are likely to be admitted, regardless of their race; likewise, students of any race with very weak academic records are likely to be rejected. *See* CAJA 1871-72. It is, as Justice Powell noted, for "the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, [that] the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other

[46] The admissions data belie petitioners' claim that the University makes "unbridled use of race and ethnicity in making admissions decisions," Pet. Br. 13. The University's expert, Professor Stephen Raudenbush, demonstrated statistically that "one cannot reasonably conclude that [race] predominates over other factors in the admissions process." CAJA 1871. *Cf. Miller v. Johnson*, 515 U.S. at 913 (race may be considered so long as it is not the "dominant and controlling rationale"). Indeed, this conclusion is obvious given that measures of academic capability account for up to 110 points, and all other factors combined can account for no more than 40 points.

[47] Applicants may receive points for many different combinations of attributes and experiences. For example, a white student from Michigan's Upper Peninsula who had demonstrated outstanding leadership and service could receive 21 points (10 points for Michigan residency, six points for residency in an underrepresented Michigan county, and five points for leadership); a white student from rural North Carolina whose family is on public assistance and who wrote an outstanding essay could receive 25 points (two points for residency in an underrepresented state, 20 points for socioeconomic status, and three points for the essay); and an Asian-American Michigan resident whose mother is an alumnae and who demonstrated superb personal achievement and leadership could receive 24 points (ten points for Michigan residency, four points for alumni relationship, five points for personal achievement, and five points for leadership).

candidates' cases." *Bakke*, 438 U.S. at 323.[48] Petitioners urge that race should *never* affect an admissions outcome. But that position is irreconcilable with *Bakke*: if race never made a difference in the outcome, it would not be a "plus" factor in any meaningful sense.[49]

Petitioners and the United States suggest that awarding points to every minority applicant "tips the balance" in favor of admission for every minority applicant. But the fact that every minority applicant receives the same "plus" hardly means that race plays the same role in the admissions outcome for each applicant. *See* CAJA 1842; *id.* at 1867-68, 1871.[50] The "weight" given to race, or its impact, if any, on the ultimate admissions decision cannot be

[48] LS&A's consideration of race in admissions does not "unduly burden" non-minority applicants. *Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting). Shifting to a race-neutral system "would dramatically reduce the probability of acceptance for members of under-represented minority groups while having a very small positive effect on the probability of admission for others." CAJA 1876; *see also id.* at 1889 (demonstrating that likelihood of admission for minorities would fall from 86% to 32% but would rise only from 71% to 77% for non-minorities). *See generally* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045 (2002); *see also Hopwood v. Texas*, 236 F.3d 256, 265-72 (2000) (upholding as "eminently correct" district court's finding, on basis of expert testimony, that none of the plaintiffs would have been admitted to law school under a race-blind system), *cert. denied*, 533 U.S. 929 (2001).

[49] Petitioners confuse an impermissible "two-track" system with the notion—explicitly permitted under *Bakke*—that race may be a scale-tipping factor. Petitioners' evidence of a "two-track" system is nothing more than different admissions outcomes for two hypothetical students, one minority and one non-minority, who have the same selection index score apart from the "plus" the minority student receives for race. *See* Pet. Br. 21. This simply shows that race will in certain cases make a difference to the outcomes of admissions decisions. But that, of course, is what it means for race to be considered as a factor in admissions.

[50] Petitioners are wrong to argue that assigning points to all minority applicants is unduly mechanical and thereby unconstitutional. Standardized procedures designed to ensure consistency across a large volume of applications are not incompatible with the individualized review that *Bakke* requires.

understood in isolation from the applicant's other attributes or the strength of the applicant pool as a whole. For example, for minority applicants with strong academic records or a combination of other attributes, the "plus" for race might have no effect because the applicant would be admitted without it. *See id.* at 1867-68, 1871. As Justice Powell described it, "[t]he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive." *Bakke*, 438 U.S. at 317. The key is that a "properly devised" admissions program "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.* at 317.

Petitioners' complaint that all minority applicants, regardless of "disadvantage," receive the same "plus" for race misunderstands the nature of the compelling interest. Assigning a "plus" only to those minority students who are disadvantaged might be narrowly tailored to achieve some kind of remedial purpose, but LS&A's objective is to achieve the educational benefits that come from a racially diverse student body, not to provide a remedy for societal discrimination. Inclusion of minority students from all walks of life and from very different backgrounds will not only contribute to a richer educational environment, but will also demonstrate the diversity of experience and views among minority students. That is why a "black student with high grades from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx." *Shape of the River* at 280.

Moreover, assigning points to all minority students is necessary to create a realistic possibility that the University can achieve the educational benefits that flow from meaningful racial and ethnic diversity on campus. Justice Powell recognized this point, in expressly permitting a university to pay "some attention to distribution among many types and categories of students" and to operate its admissions system with an "awareness of the necessity of

including more than a token number of [minority] students," so long as it does not set a "minimum number" of minorities for admission. *Bakke*, 438 U.S. at 316-17 (citation omitted).

One significant hurdle to achieving meaningful racial and ethnic diversity is the small pool of qualified minority applicants—both in terms of absolute numbers and in comparison to the pool of non-minority applicants.[51] Petitioners assert that LS&A employs "separate standards" for minority and non-minority applicants because it ends up admitting virtually all "qualified" minorities, while denying admission to "qualified" non-minorities. Pet. Br. 22-24. What petitioners characterize as "separate standards"[52] is instead a backward-looking description of admissions outcomes in light of the small pool of qualified minority applicants.

To the extent that petitioners use the term "separate standards" to capture the statistical fact that the average grades and test scores of admitted minority students are somewhat lower than the average grades and test scores of admitted non-minorities, that fact, standing alone, has no constitutional significance. Further, this phenomenon cannot be said to measure the "extent" to which race is taken into account, as it is in part an unavoidable consequence of the reality that, nationally and in the State of Michigan, average grades and test scores are lower for minority students. *See* CAJA 4012-23. This disparity means that, for example, even if the University selected a particular SAT score and admitted all applicants with scores

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[51] Petitioners' description of admissions data, *see* Pet. Br. 7, is misleading because it ignores the pool size disparities. Acceptance rates expressed as percentages are deceptive, standing alone, because they often reflect decisions for very few minority applicants.

[52] There are no "separate standards" for minority applicants. Counselors use the same selection index worksheet, listing the same factors, to evaluate all applications. Admissions decisions are made according to selection index cutoffs applicable to all applicants, or through a discussion that takes into account every aspect of a candidate's application.

above that level, regardless of race, the average scores of the admitted minority students would still be lower. In any event, the gap in academic credentials is smaller than petitioners suggest. Between 1995 and 1999, the average academic GPA was approximately 3.5 for non-minority applicants and approximately 3.2 for minority applicants. *See id.* at 1879, 1906. This marginal difference in average GPAs remains roughly the same when comparing the data for admitted and enrolled students: it is approximately the difference between an A- (3.67) and a B+ (3.33).

The 20 points that the University attributes to race and ethnicity in its admissions process reflects LS&A's judgment, based on its experience, regarding the proper balance to be struck among competing considerations: the goal of obtaining the educational benefits of a racially diverse student body; the need for more than token numbers of minority students on campus to make it possible to generate those benefits; the small size of the pool of minority applicants with competitive academic credentials; the interest in assuring that all students admitted are prepared to succeed academically; and the objective of enrolling a class that is broadly diverse in ways other than race and ethnicity. *See Bakke*, 438 U.S. at 316-18 (noting that universities may accord different weights to different admissions criteria in light of "the 'mix' both of the student body and the applicants" and the universities' goal of obtaining the educational benefits of diversity). Another institution might strike the balance in a different place, depending on the particular values that institution seeks to further in the admissions process.

For LS&A, allotting fewer than 20 points would undermine its ability to achieve the educational benefits of diversity, because *even with* a 20-point "plus," LS&A is not able to achieve sufficient racial diversity to ensure that meaningful numbers of minority students consistently are present in formal and informal educational settings on campus. At the same time, it is LS&A's judgment that allotting more than 20 points may tip the scale too far in terms of admitting students who might not be academically

prepared to succeed at the University. That would not only unacceptably undercut the University's commitment to academic excellence, but it also would undermine its ability to secure the educational benefits of diversity because it would hinder the University's efforts to provide an educational environment in which students view each other as peers.

Striking the proper balance among these factors is an exercise of educational expertise and judgment. Competing admissions objectives, such as academic selectivity and broad diversity across categories other than race, will always limit the extent to which an institution considers race as a factor in admissions. Requiring the University to accord measurably less weight to race would, as a practical matter, preclude any selective institution of higher education from employing any admissions program that gives a "plus" to race. Justice Powell was right to conclude that, within the framework set forth in *Bakke*, this fine-tuning ought to be left to the exercise of good-faith judgment by education professionals who have the expertise and experience to balance the consideration of race against other concerns to advance the institution's educational mission. That is the workable balance that *Bakke* struck in prohibiting quotas, while permitting universities to consider race as one of many factors in an individualized, comprehensive review that evaluates each applicant as a whole person.

B. The University Cannot Achieve Meaningful Diversity Without Considering Race And Ethnicity As Factors in Admissions.

Without suggesting any viable race-neutral alternatives for achieving diversity, petitioners flatly assert that the University has not "meaningfully considered" any such alternative. Pet. Br. 12, 30. But as the district court specifically found, the University came forward with substantial, credible, and unrebutted evidence that "a race-neutral admissions program would substantially reduce the number of under-represented minority students in the

LSA's incoming student body." Pet. App. 40a. The court rejected petitioners' suggestion that a random selection of applicants who passed some fixed "qualification threshold" might suffice, because of the small size of the relevant applicant pool; noted that another so-called alternative—bare reliance on test scores at the expense of all other relevant criteria—would result in significant additional rejections of qualified minority applicants; and credited expert testimony as to the inefficacy of relying solely on family income as a predictor of racial and ethnic diversity, given the even smaller pool of highly qualified minorities in the lowest income strata. *See id.*[53]

The United States echoes the unsupported assertion that race-neutral plans were ignored. *See* U.S. Br. (*Gratz*) 10, 18. It further asserts that LS&A has "ample race-neutral alternatives" at its disposal, *id.* at 18—approaches that it claims have "proven effective in meeting the . . . laudable goals of educational openness, accessibility and diversity in other States," *id.* at 11. The United States actually offers only one such alternative: percentage-based admissions programs such as those currently in place in the public university systems of Texas, Florida, and California. *See id.* at 13-14.[54] These programs, which guarantee some

[53] An academically selective college can expect that only one in six qualified low-income applicants will be either African-American or Hispanic. *See* Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in *The Black-White Test Score Gap* 431, 450 (Christopher Jencks & Meredith Phillips, eds., 1998); *Shape of the River* at 46-50.

[54] The United States briefly alludes to other possible "race-neutral alternatives," suggesting that the University might actively seek other sorts of diversity, such as geographical diversity; "modify or discard facially neutral admissions criteria that tend to skew admissions results" against minorities; or open its doors "to the best students from throughout the State or Nation." U.S. Br. (*Grutter*) 13-14; *see also* U.S. Br. (*Gratz*) 14-15. As to the first suggestion, it is uncontroverted that LS&A already pursues such a policy, as it grants selection index points to, for example, students from underrepresented areas, from underprivileged socioeconomic backgrounds, and with extraordinary indicia of personal achievement and leadership potential. The United States' second point actually supports LS&A's educationally sound decision to consider non-academic factors in combination with standardized testing and to place more emphasis on high school grades than on test scores. Incomprehensibly, petitioners and the United States urge the Court to force LS&A to rely *more* heavily on standardized test scores, U.S. Br. (*Gratz*) 24 (urging reliance on "objective qualifications"); *see also* Pet. Br. 25, even as the United States promises that diversity could be better pursued were such data *disregarded*. Finally, as to the third suggestion, it is undisputed that LS&A already "opens its doors" to the best students from throughout Michigan, the other 49 States, and dozens of countries.

form of admission to a fixed percentage of the graduates from each high school in the State,[55] are by no means "race-neutral." Nor have they been proven effective.[56] Further, even were such plans minimally "effective" in maintaining some level of racial and ethnic diversity in those states' public systems of undergraduate education, they would have

[55] Texas offers students graduating in the top 10% of any Texas high school admission to the public institution of their choice. California offers admission to the state system, though not to the school of one's choice, to the top 4% of each high school's graduates, provided they have completed requisite coursework. Florida guarantees admission, though not choice of school, to the top 20% of each high school's graduates who have completed a prescribed curriculum. *See generally* Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* 19-22 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.php#full report; U.S. Comm'n on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education* vii-x (2002) ("*Beyond Percentage Plans*").

[56] Even the authors of Texas' percentage plan confirm that it has been ineffective in increasing diversity, is not a national model, and cannot substitute for direct, competitive consideration of race in admissions. *See* Brief for Authors of the Texas Ten Percent Plan as *Amicus Curiae*. *See also* Brief for Professors Glenn C. Loury, Nathan Glazer, John F. Kain, Thomas J. Kane, Douglas Massey, and Marta Tienda as *Amici Curiae*; Brief for the University of Pittsburgh, et al. as *Amici Curiae*.

devastating effects on the University of Michigan's ability to define and pursue its educational mission.[57]

As an initial matter, the suggestion that the percentage plans in Texas, Florida, and California are "race-neutral" is erroneous. First, while *facially* race-blind, they unquestionably were adopted with the specific purpose of increasing representation of African-Americans and Hispanics in the public higher education system.[58] Indeed, petitioners, the United States, and the universities themselves measure the success of these percentage plans by examining a single, race-driven data point, that is, the level of minority representation in the student body—the very criterion petitioners would have LS&A ignore. Such programs are deemed effective when minorities represent a specific percentage of the student body—a percentage roughly equivalent to that in place in the last year in which the university explicitly considered race in individual admissions.[59]

Second, these percentage plans are not race-neutral because they knowingly are premised on racial segregation in a state's elementary and secondary public school system. In Texas, for example, granting automatic admission to all

[57] The district court considered and rejected the viability of a percentage plan like the one in Texas. *See* Pet. App. 40a-41a (crediting unrebutted expert testimony that a percentage plan would damage LS&A's academic selectivity and result in a "spurious form of equality").

[58] *See* Petition for Writ of Certiorari by the State of Texas et al. at 18-19, *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001) (conceding as much); Horn & Flores, *supra*, at 15-19; Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* 11 (2003); John F. Kain & Daniel M. O'Brien, *Hopwood and the Top 10 Percent Law: How They Have Affected the College Enrollment Decisions of Texas High School Graduates* 3-4 (2003), *available at* http://www/utdallas.edu/research/greenctr/; *Beyond Percentage Plans*, *supra*, at 16 (California), 53 (Florida).

[59] *See* U.S. Br. (*Gratz*) 14; U.S. Br. (*Grutter*) 14-17 and sources cited therein; Brief for the State of Florida as *Amicus Curiae* at 4, 8-10; Kain & O'Brien, *supra*, at 4-5.

students in the top 10% of their high school's graduating class would, it was thought, guarantee a pool of African-American and Hispanic freshmen, because the racial segregation of Texas high schools had resulted in sufficient majority-minority schools as to guarantee that almost all of the top 10% of students in many schools would be minorities.[60] It is simply hiding the ball to hold out percentage plans as a race-blind alternative, where they in fact manifest a less forthcoming form of race-consciousness.

Moreover, the assertion that the few extant percentage programs have "proven effective" in attaining educational diversity is premature and inaccurate. U.S. Br. (*Gratz*) 11. Research on these recently-instituted programs is just beginning to generate data measuring their short-term impact. And that data shows that percentage plans have not been nearly so successful in achieving racial and ethnic diversity as their proponents might claim, particularly with respect to selective flagship institutions.[61] Further, such

[60] *See* Marta Tienda et al., *Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* 7 (2003), *available at* http://www.texastop10.princeton.edu/publications/tienda012103.pdf; Kain & O'Brien, *supra*, at 4; *see also* Jeffrey Selingo, *What States Aren't Saying About the 'X-Percent Solution,'* Chron. Higher Ed., June 2, 2000, at A43 ("Aides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students.").

[61] "[T]he top ten percent admission policy is not an alternative to affirmative action and by itself can only achieve minimal campus diversity, even in the presence of high levels of [high] school segregation." Tienda, et al., *supra*, at 41 (emphases omitted); *see also Beyond Percentage Plans*, *supra*, at 19-24, 57-60, 65-66, 116; Marin & Lee, *supra*, at 23, 27-31, 34-36; Kain & O'Brien, *supra*, at 29-32; Horn & Flores, *supra*, at 50-51, 58-59 ("percent plans seem to have the least impact on the most competitive campuses, which have persisting losses in spite of many levels of efforts to make up for affirmative action").

Further, to the extent that some percentage plans have contributed to the presence of minorities in higher education, that limited success is dependent on race-conscious recruitment, financial aid, and support programs. *See* Horn & Flores, *supra*, at 58-59; Marin & Lee, *supra*, at 31-

plans may create perverse incentives, encouraging African-American and Hispanic parents to keep their children in low-performing, segregated schools,[62] discouraging students from taking challenging classes in the interest of boosting class rank, and deterring students from pursuing extracurricular activities.[63]

More fundamentally, even were the percentage plans proffered by the United States shown eventually to have some moderate success in achieving racial and ethnic diversity, they would require institutions of higher education that seek to enroll a highly qualified, broadly diverse student body to radically alter their missions. In Michigan, such a plan would be destructive.

First, imposition of a percentage plan in Michigan would fundamentally change the composition of LS&A's student body, on which the school's character, reputation, and educational excellence depends. With their exclusive focus on class rank, percentage plans are incompatible with the individualized, "whole-person" file review that LS&A employs and that Justice Powell praised. *See Bakke*, 438 U.S. at 318. Rather than focusing separately on each of the ways in which an individual might contribute to the overall strength and diversity of the class, percentage plans are a blunt instrument that deprives admissions professionals of

33, 35-37 (Florida's Talented 20 program expressly retained explicitly race-conscious scholarship, recruitment, and support programs). The legality of these efforts may well be at issue herein. *See, e.g., Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

[62] The position of the United States is in direct tension with national efforts to desegregate secondary education and encourage mobility out of low-performing schools, for example, through the No Child Left Behind Act, Pub. L. No. 107-110, § 5301(a)(4) (A), 5301(a)(5), 115 Stat. 1425, 1806 (2002) (codified at 20 U.S.C. § 7231).

[63] *See* Selingo, *supra*, at A31 (noting that Florida's percentage plan penalizes students at more competitive high schools and generally excludes strong minority students in integrated schools and magnet programs).

the flexibility to achieve the broad diversity that is crucial to the University's mission.

For this reason, percentage plans cannot be considered more narrowly tailored to achieve the genuine compelling interest—the educational benefits of diversity—than the current LS&A admissions system. Indeed, in subordinating the interest in the whole-file review that Justice Powell emphasized to the interest in enrolling a certain percentage of minority applicants, these plans more closely resemble the Davis quota than either the Harvard plan or LS&A's admissions program.

Percentage plans also would hinder the University's ability to maintain its character as a national institution with a geographically diverse student body. Except for the University of California's campuses at Berkeley and Los Angeles, none of the three percentage-plan States' systems includes a flagship campus comparable to the University of Michigan at Ann Arbor,[64] and the student body at LS&A is by far the most national in scope.[65] In that sense, the University is similarly situated to many selective private

[64] It is telling, therefore, that Berkeley's and UCLA's ability to attract, enroll, and retain African-Americans, Hispanics, and Native Americans has been especially hindered by enforced race-neutrality and imposition of a percentage plan. *See* Horn & Flores, *supra*, at 39, 48; *Beyond Percentage Plans*, *supra*, at 18.

[65] While LS&A draws more than half its applicants and one-third of its student body from out-of-state, the same is not true of the flagship institutions in States with percentage plans. In 2001, 14% of University of Texas-Austin applicants and 9.5% of Texas A&M applicants were non-Texans, and out-of-state students comprised only around 7% and 5%, respectively, of those schools' freshman classes. *See* Texas Higher Education Coordinating Board, *First-Time Undergraduate Applicant, Acceptance and Enrollment Information for Summer/Fall 2001*, 66-67, 42-43 (2002), *available at* http://www.thecb.state.tx.us/reports/ pdf/0515.pdf. Similarly, Florida's flagship campus, the University of Florida, draws only 13% of its students from outside Florida. *See* Marin & Lee, *supra*, at 28. The University of California at Berkeley has an out-of-state undergraduate enrollment of just under 10%, *see* http://osr4.berkeley.edu/, and at UCLA such enrollment is a mere 6%, *see* http://www.ucla.edu.

institutions. The effect of such a sea change on its ability to define itself cannot be overstated: the University would be an entirely different institution.

Second, a percentage plan in Michigan could not possibly generate a racially and ethnically diverse student pool. California, Florida, and Texas all are extremely populous States with very substantial populations of both African-Americans and Hispanics.[66] Each encompasses numerous geographical areas that are majority-minority, and correspondingly embraces relatively large numbers of high schools in which African-Americans and Hispanics form the overwhelming majority of students at all levels of class rank.[67] While Michigan's secondary school system is highly segregated by race, the overwhelming concentration of African-Americans in the Detroit area means that the statewide number of majority-minority schools is dwarfed by the far greater number of Michigan schools that are virtually all-white. *See* CAJA 1985, 1951. Indeed, Michigan is overwhelmingly white.[68] Hispanics and Native Americans

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[66] Texas is projected to become a "majority-minority" state by 2005, and whites already are a minority among those of college age. *See* Tienda, et al., *supra*, at 6. Indeed, this is now the case in California, where non-Hispanic whites are already the minority. *See* http://quickfacts.census.gov/qfd/states/06000.html. Looking specifically to potential college applicants, the demographics of these three states are telling. Among Texans between 15 and 19 years of age as of the 2000 census, 44% were white, 13% African-American, and 39% Hispanic. Among Californians of the same age cohort, 34% were white, 7% African-American, and 39% Hispanic. In Florida, that same youth population was 55% white, 21% African-American, and 20% Hispanic. *See* Horn & Flores, *supra*, at 26. Indeed, more than three-quarters of the Nation's Hispanic population lives in those three states plus New York and Illinois; more than half live in California and Texas. *See* CAJA 1959.

[67] *See* Horn & Flores, *supra*, at 27. For example, in Florida's populous Miami-Dade County, 60% of the population is Hispanic and 21% is African-American. *See* http://factfinder.census.gov.

[68] According to the 2000 U.S. Census, among Michigan residents of 15-19 years of age, 75.7% were white, 15.2% African-American, 4.3% Hispanic, .6% Native American, and 1.8% Asian-American. *See* http://factfinder.census.gov/servlet. The pool of potential minority college applicants is even smaller: among Michigan students attending the 12th grade of high school in the 2000-2001 school year, 83% were white, 12% African-American, 2% Hispanic, 2% Asian-American, and 1% Native American. *See* http://nces.ed.gov/ccd/bat.

are not a majority in *any* county or school district in Michigan. *See id.* at 1985-88, 1965-67 (Table 3), 1974 (Table 7).

Thus, even were it otherwise feasible for the University to implement some sort of high school-based percentage plan without fundamentally altering its very identity—which it plainly is not—the effects on diversity would be disastrous, particularly with regard to Hispanic students. The statistical reality is that infinitesimal numbers of minorities would be admitted through such a program, except through a small number of primarily African-American high schools in the urban Detroit area. Because virtually all of LS&A's Hispanic students come from outside the State of Michigan, under a percentage plan, LS&A would be hamstrung in its ability to enroll such students. And its African-American student population would be dominated by students from a small geographical area, frustrating the interest in geographic and other diversity within all sectors of the student body.

This Court has taught that a race-neutral approach is "viable" for purposes of narrow tailoring only if that approach would be "comparably consistent" with, or better satisfy, the other traditional, non-racial goals also at stake. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001); *see also Wygant*, 476 U.S. at 280 n.6 (an alternative must "promote the substantial interest about as well and at tolerable administrative expense"). That is not the case here. The University is not required to adopt a proposed race-neutral alternative that would undermine traditional admissions standards, depriving it of the ability to judge applicants as individuals and admit a class that, viewed collectively, brings to the table a stimulating mix of talents, perspectives, backgrounds, and academic interests.

The University of Michigan has a substantial interest in creating and maintaining a world-class, selective institution of higher learning, seeking to enroll a diverse array of the best students from within the State and beyond its borders. The University's current admissions system represents a careful and measured effort to tailor its admissions processes to its legitimate—indeed, unchallenged—educational objectives.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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